81-2232

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

TOM S. BRUCE,

PETITIONER

v.

ROBERT L. KOSNOSKI,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Does the trial court's denial of Defendant's Motion for Continuance constitute an abuse of discretion which denied Petitioner due process of law, where trial court allowed Respondent to amend his Complaint to include a securities fraud cause of action thirteen 'ays before trial?

LIST OF PARTIES INVOLVED

Pursuant to the Rules of this Court, the parties to this proceeding in this Court are identical to the parties before the United States Court of Appeals for the Fourth Circuit.

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OPINIONS

The opinion of the United States Court of Appeals for the Fourth Circuit from which this Petition for a Writ of Certiorari is derived is set forth in the Appendix, as is the unpublished decision of the United States District Judge for the District of South Carolina prior thereto. No official citation is currently available for either opinion.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit was rendered and entered on February 5, 1982. Following a Petition for Rehearing which was filed on February 19, 1982, an Order denying the Petition for Rehearing was rendered and filed on March 9, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness, against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 35-1-1490, Code of Laws of South Carolina (1976), provides:

> Any person who:
>
> (1) Offers or sells a security in violation of subsection (2) of §35-1-170 or §35-1-410 or §35-1-810, or of any rule or order under §35-1-50 which requires the affirmative approval of sales literature before it is used or of any condition imposed under §35-1-950 or §35-1-990; or

(2) Offers or sells a security by means of any untrue statement or a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission;

Is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at six per cent per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at six per cent per year from the date of disposition.

STATEMENT OF THE CASE

Respondent, Robert Kosnoski, a citizen and resident of West Virginia, instituted this action in February of 1978 in the United States District Court for the District of South Carolina on the basis of

diversity of citizenship. 28 USC §1332. The original Complaint by the Respondent alleged that the Petitioner, Tom S. Bruce, a citizen and resident of South Carolina, had violated the South Carolina Uniform Securities Act. More specifically, the original Complaint alleged that not only had the Plaintiff failed to register certain securities as required by the South Carolina Act, but also that the Petitioner had violated §35-1-1490(2) of the South Carolina Code of Laws (1976) by certain misrepresentations and omissions. A timely Answer was filed on behalf of the Petitioner.

In May of 1980, over four months prior to trial, the Respondent amended his Complaint and abandoned the allegations concerning misrepresentations and omissions. An Answer was filed on behalf of the Petitioner to the Amended Complaint, and the parties proceeded to prepare for trial.

On October 7, 1980, thirteen days prior to trial, a pre-trial conference was held

by the District Court. At the conference, the Respondent filed a proposed amendment to his Amended Complaint. The proposed amendment reinstated the allegations as to misrepresentations and omissions which had been abandoned by the Respondent over four months earlier.

Despite objections by the Petitioner, the District Court Judge granted the Respondent's Motion to amend his Complaint at the pre-trial conference. Following that ruling by the Court, which was not reduced to written order, the Petitioner moved for a continuance in order to meet these newly reinstated allegations. However, the Court denied the Petitioner a continuance and forced the Petitioner to trial thirteen days later on all of the Respondent's theories.

The case was tried before the District Court, without a jury, on October 20-22, 1980. At the beginning of the trial, the Petitioner again advised the Court that he was not ready to proceed on the misrepresen-

tations and omissions claims, but Petitioner was required to go to trial on all allegations. The District Court issued its Findings of Fact and Conclusions of Law and Order on November 10, 1980, after which the Petitioner filed a Motion to Alter and Amend Findings of Fact, to Alter and Amend the Judgment, and for a New Trial. On January 1, 1981, the District Court denied the Motion but filed an Amended Order reaffirming its judgment in favor of Respondent in the sum of Two Hundred Sixty-five Thousand ($265,000.00) Dollars plus six (6%) percent interest from December 24, 1975; the sum of One Hundred Sixty Thousand ($160,000.00) Dollars plus six (6%) percent interest from April 15, 1976; and the sum of One Hundred Fifty-nine Thousand Eight Hundred Forty ($159,840.00) Dollars plus six (6%) percent interest from April 15, 1977.

The Petitioner appealed the District Court's decision to the United States Court

of Appeals for the Fourth Circuit on several grounds, including the denial of the continuance. On February 5, 1982, that Court affirmed the District Court's Order. Following a Petition for Rehearing which was filed on behalf of the Petitioner, the United States Court of Appeals for the Fourth Circuit issued an Order denying the Petition for Rehearing on March 9, 1982.

ARGUMENT

The Petitioner's sole basis for his request that this Court issue a Writ of Certiorari is that the trial court abused its discretion in failing to grant the Petitioner a continuance of the trial. This continuance was requested at the pre-trial conference, just thirteen days prior to trial, immediately following the trial court's decision to allow the Respondent to amend his Complaint and radically change his theories of recovery against the Petitioner.

Traditionally, the question as to whether a continuance should be granted is within the discretion of the trial judge. E.g., Ungar v. Sarafite, 376 U.S. 589 (1964). However, as this Court noted in the Ungar decision, such decisions are subject to review based on the particular facts of the case.

> There are no mechanical tests for deciding when a denial of continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. [Citations omitted].

Id. at 589. Moreover, there are certain factors which may be reviewed to determine whether the trial court's actions were fair and unreasonable.

> Among the considerations are: The inconvenience to the witnesses, the court, counsel and parties; have other continuances been granted; is the request for a delay based on legitimate reasons; is the delay defendant's fault; will denial of the continuance prejudice the defendant.

United States v. Leavitt, 608 F.2d 1290,

1293 (9th Cir. 1979) and citations contained therein.

In the instant action, all factors indicate that the trial judge abused his discretion by failing to grant the requested continuance. Since the continuance was requested at the earliest date possible, no inconvenience would have occurred by granting the continuance. In that regard, Respondent's counsel did not even oppose the requested continuance. Furthermore, no other continuances had been requested or granted in the case, and as discussed infra, legitimate reasons were provided to the Court for the requested delay. Additionally, the delay was in no way caused by the Petitioner. The result of the failure to grant the requested continuance was the Petitioner's inability to adequately defend himself against the allegations of the Respondent, thus depriving him of his constitutionally guaranteed right to due process of law.

The newly amended Complaint contained allegations of securities fraud, one of the most complex areas of modern legal practice. The trial court permitted the Respondent to reinstate his allegations of misrepresentations and omissions as a basis for recovery under the South Carolina Blue Sky Law (§35-1-1490, 1976 Code of Laws of South Carolina), whereas those allegations had been specifically abandoned in May of 1980 by the Respondent, with this action occurring over four months before trial. After the abandonment of these claims, the Petitioner prepared for trial on the Respondent's only remaining claim, namely the alleged failure to register under the Blue Sky Law.

As a result of the trial court's action, the Petitioner was forced to trial in a fashion which simply left him unprepared to adequately present a defense to the Respondent's new allegations. At the beginning of the trial, just thirteen days after the pretrial conference wherein the amendments

were permitted, the counsel for the Petitioner advised the Court as follows:

> Your Honor, the Defendant is ready to proceed the trial on the failure to register claim under the South Carolina Blue Sky Act for the reasons which we discussed, at the pre-trial conference, with Your Honor in connection with the amendments to the Complaint, which was filed by the Plaintiff on October 6. We have to announce for the record that we are not ready to proceed on the anti-fraud claims under the South Carolina Blue Sky. (Emphasis added).

(4th Circuit, Joint Appendix, pp. 123-124). Despite this candid admission by Petitioner's trial counsel, the District Court forced Petitioner to go forward. Thus, although the Petitioner was prepared to face the one theory of recovery he had anticipated facing for the four months prior to trial, thirteen days just was not enough time to allow him to prepare for the difficult ommissions and misrepresentations allegations.

These new allegations radically changed the nature of the Respondent's case. Fully eighty to eighty-five percent of the testi-

mony introduced at trial concerned the misrepresentation issues alone. For example, the Respondent presented testimony by an accountant as to the use of certain funds at issue. This testimony was directed totally at the question of misrepresentations and omissions, with absolutely no relevancy to the question of whether the limited partnership interests were required to be registered as securities.

In comparison, the Petitioner was unable to offer any expert accounting testimony of his own. Quite obviously, the thirteen day period between the pre-trial conference and the trial itself was simply an insufficient amount of time to allow an accountant to review all the papers at issue, analyze them, meet with Petitioner's counsel, and then be prepared to testify at trial. This situation exemplifies the unfairness of the District Court's decision in depriving the Petitioner of an opportunity to properly defend himself against the Respon-

dent's theory of recovery added just thirteen days prior to trial.

From May of 1980 to October 7, 1980, the Petitioner was without any knowledge that the Respondent intended to pursue the allegations concerning misrepresentations and omissions. The Petitioner's pre-trial brief, which was included in the record before the United States Court of Appeals for the Fourth Circuit, demonstrates the total concentration of the Petitioner on the registration issue. The brief was devoid of any reference to the allegations concerning omissions and misrepresentations, which is ample proof that the Petitioner was caught totally by surprise by the amendment to the Complaint at the pre-trial conference. In order for the Petitioner and his counsel to prepare to meet these allegations, they would have needed to guess that the Respondent would ambush them thirteen days before trial with these allegations. Rather than endorsing these actions by the Respondent,

the lower court should have granted a continuance instead of forcing the Petitioner to trial on these allegations with less than two weeks' notice.

A review of the Order of the District Court demonstrates quite vividly the importance of the misrepresentation and omissions allegations. (Appendix, p.13a). This Order focuses almost entirely on the misrepresentation and omission allegations, with very little consideration of the registration issue. Although the misrepresentation and omission allegations were in the original Complaint, they were deleted by the first Amended Complaint, over four months before the pre-trial conference. Without question, the Petitioner had the right to rely on the fact that these allegations were no longer a part of the case. This startling change in position certainly warranted the Petitioner in receiving more than the allotted thirteen days to prepare to meet these allegations.

The lack of time provided to the Petitioner to adequately meet the reinstated allegations is underscored by the fact that this action is based upon the securities statutes. The South Carolina Blue Sky Law is similar to securities statutes in other states, and it is well known that securities actions based on these statutes are quite complex. Although the thirteen day period between the pre-trial conference and the trial might have been sufficient time to allow a defendant to meet new allegations in a simple tort or contract case, it was not sufficient time in a complex securities case. Thus, althouth the thirteen day period might not have proved to be a stumbling block in a simpler case, it presented far too great a hurdle in this case for the Petitioner to even have a chance to survive at trial.

Two other factors are also relevant to the Petitioner's requested continuance. First, the continuance would have presented no prejudice or harm to the Respondent. In

fact, the Respondent did not even oppose the Petitioner's motion for a continuance before the trial judge, who simply denied the motion of his own volition. Furthermore, the docket entries reflect the fact that this was the first continuance requested by the Petitioner, thus further demonstrating that the Petitioner was not stalling, but was rather in dire need of the continuance to adequately prepare for trial as a result of the trial court's decision to permit the last minute amendments by the Respondent.

Trial judges have been reversed in numerous instances where the denial of the continuance amounted to an abuse of discretion. For instance, a district court judge was reversed by the Sixth Circuit Court of Appeals where the judge failed to grant a continuance to enable the landowner-corporation in a condemnation case to obtain counsel, where the corporation's president had only learned one week before trial that he would not be able to represent

the landowner pro se. United States v. 9.19 Acres of Land, Marquette County, Michigan, 416 F.2d 1244 (6th Cir. 1969). Furthermore, the Fifth Circuit Court of Appeals reversed a trial court for its denial of a continuance where the denial prevented the petitioner in a habeas corpus proceeding from presenting his only expert witness as to an insanity defense, where the court determined that the Petitioner had used due diligence in attempting to have the witness present at trial. Hicks v. Wainwright, 633 F.2d 1146 (5th Cir. 1981). Similarly, the United States Court of Appeals for the District of Columbia reversed a trial judge where the court denied a motion for continuance in the face of the illness of the party moving for a continuance, who was also the most material witness in support of her own case. Cornwell v. Cornwell, 118 F.2d 396 (D.C. Cir. 1941). Finally, and of great importance to the instant action, is the fact that denials of continuance have

also been reversed where it was determined that the party moving for a continuance did not have sufficient notice of the opposing party's claims or sufficient time to meet those claims. United States v. Hardy, 368 F.2d 191 (10th Cir. 1966); Good v. Pennsylvania R. Co., 263 F.Supp. 84, Aff. 384 F.2d 989 (D.C.Pa. 1964).

In this case, the effect of the denial of the motion for a continuance was to deprive the Petitioner of his due process rights under the Fifth Amendment to the United States Constitution. The Petitioner labored for the final four months of case preparation (prior to the pre-trial conference) under the justifiable assumption that the misrepresentation claims of the Respondent were no longer a part of this action. The net effect of the amendment permitted at the pre-trial conference was to completely restructure the thrust of the Respondent's allegations against the Petitioner. The thirteen day period between

the pre-trial conference and the trial was simply an insufficient amount of time to enable the Petitioner to meet these new allegations in a complex securities case and to obtain the necessary expert testimony to support his position.

The admission by Petitioner's then counsel at the beginning of the trial that Petitioner was not ready to proceed on the anti-fraud claims under the South Carolina Blue Sky Law deserves the attention and consideration of this Court. With a claim and judgment exceeding Seven Hundred Thousand ($700,000.00) Dollars, the trial court abused its discretion by failing to grant the Petitioner's requested continuance. All that the Petitioner requested from the trial court and all that the Petitioner requests from this Court is that be be given an opportunity to try this case on the merits after proper preparation. Certainly, there can be no harm to the Respondent in that regard, since all the

Petitioner seeks is justice on the merits. It is respectfully submitted that the action by the trial court, which had the effect of endorsing the Respondent's tactics of ambush and which caused the deception at issue, should be reviewed by this Court. Without such a review, the Petitioner will be denied any semblance of the right to due process of law guaranteed by the Fifth Amendment to the United States Constitution.

CONCLUSION

The action of the trial judge and affirmance by the Fourth Circuit Court of Appeals represent such a departure "from the accepted and usual course of judicial proceedings...as to call for an exercise of this Court's power of supervision." Rule 17(a) of the Rules of the Supreme Court of the United States. Although the current backlog of court dockets demands expediency in the trying of cases, this Court cannot allow expediency to be accomplished at the

cost of denials of constitutionally guaranteed due process of law.

For these reasons and the reasons stated above, the Petition for Writ of Certiorari should be granted.

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AFFIDAVIT OF SERVICE

In accordance with Rules of the Supreme Court of the United States, I hereby certify that I have this 3rd day of June, 1982, filed the required copies of the Appellant's Petition for Certiorari in the Clerk's Office of the Supreme Court and have mailed the required copies of the same to:

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APPENDIX

UNITED STATES COURT OF APPEALS

For The Fourth Circuit

No. 81-1154

Robert L. Kosnoski,

Appellee,

v.

Tom S. Bruce,

Appellant.

Appeal from the United States District Court for the District of South Carolina, at Greenville. G. Ross Anderson, Jr., District Judge.

Argued: December 9, 1981
Decided: February 5, 1982

Before BRYAN, Senior Circuit Judge, RUSSELL and SPROUSE, Circuit Judges.

A. Camden Lewis (William F. Austin, Keith M. Babcock, Barnes & Austin on brief) for Appellant; O. G. Calhoun (Jesse C. Belcher, Haynsworth, Perry, Bryant, Marion & Johnstone on brief) for Appellee.

BRYAN, Senior Circuit Judge:

From a judgment for the plaintiff, Robert L. Kosnoski, in his action brought pursuant to the South Carolina Uniform Securities Act, S.C. Code §§ 35-1-10 et seq. against defendant Tom S. Bruce in the sale to plaintiff of limited partnership interests, Bruce appeals. His attack focuses upon the following incidents of trial: (1) The District Court's refusal to grant a continuance after permitting plaintiff to amend his complaint thirteen days before trial; (2) its determination that the limited partnership interests purchased by plaintiff in 1975 were "securities" within the meaning of the South Carolina Uniform Securities Act, id. § 35-1-20(12); (3) its finding that Robert C. Threlkeld and George Beggs, co-principals of Carolina Equities, Inc., were agents of defendant Bruce; and (4) its ultimate conclusion that defendant

violated S.C. Code § 35-1-1490 by a) selling non-exempt securities without registration, and b) by selling securities by means of untrue statements of material matters. Adjudging defendant in violation of the South Carolina Blue Sky Law, the trial court directed rescission of the contract, ordered repayment of the purchase price, plus statutory interest, and awarded attorney's fees to plaintiff as the prevailing party. Discerning no error in the District Court's Findings of Fact and Conclusions of Law, we affirm.

I.

As it is not infrequent under State or Federal securities law, this litigation arose from an ultimately unsuccessful money-making contrivance. In October 1975 plaintiff, a West Virginia resident, was approached by Threlkeld of Carolina Equities, Inc., about the possibility of investing in land located in Greenville, South Carolina. Plaintiff

acknowledged interest in such an investment and a meeting was arranged with the owners -- defendant, his son Dan Bruce, and one James E. Jones, Jr., all South Carolina residents. Negotiating for several months, plaintiff agreed to participate in two separate, but related investment schemes, one embracing the purchase by plaintiff of a 95% limited partnership interest in an office building called Diran Executive Plaza, and one involving the purchase of a 23.52% limited partnership share in an undeveloped nine-acre tract of land adjoining the building.

During the discussions which led to the consummation of these two deals, defendant and his original partners or agents tendered a series of inducements to plaintiff touching upon the financial strength of the general partners and companies in which they held interest, the risk involved in the contemplated invest-

ments, plans for the use of plaintiff's capital contributions, and other matters affecting the two properties. Fourteen of these were later found by the District Judge to be material and either false or misleading, because of a failure to bare facts indispensable to free the statements of anything misleading.

Under both the Land Partnership and the Building Partnership, defendant Jones, and Dan Bruce became general partners with a combined general partnership interest of 5%. These three general partners also were limited partners in the Land Partnership with combined additional interests of 72.48%. Upon receipt of their respective entitlements, plaintiff contributed $480,000 to the Building Partnership and $105,000 to the Land Partner-

ship[1] and the other parties conveyed their pre-existing interests in the building and land to the two newly-formed partnerships.

Obedient to both partnership agreements, defendant, Jones, and Dan Bruce were vested with control of the partnerships' business. The only right reserved by plaintiff, other than the right to receive a return on invested capital, was the right to block major actions (e.g., sale of all or substantially all of the partnerships' assets). In all other respects, plaintiff was but a passive participant in the two partnerships.

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1. Plaintiff also became obligated to contribute an additional $80,000 to the Land Partnership. Under the parties' agreement, this sum was not payable until plaintiff had accrued cash flow distributions totalling $80,000. Since the Land Partnership never had any earnings, this obligation never matured and consequently never was paid.

Not long after the December 1975 closing, both partnerships began to suffer serious financial difficulty. By April 1976, it was apparent that the partnerships were unable to service their mortgage indebtedness and the first mortgagees foreclosed. As a consequence, plaintiff lost his entire investment of $585,000.

On December 1, 1977, suit was instituted in the United States District Court for the District of South Carolina against defendant and his son, Dan Bruce, alleging violations of the Federal securities laws, see 15 U.S.C. §§ 77a-77aa, 78a-78kk (1976), as well as South Carolina's Blue Sky Law, see S.C. Code §§ 35-1-10 -- 35-1-1590. Prior to trial, Dan Bruce was dismissed as a defendant and all claims under Federal law were dismissed by plaintiff.

After a three-day trial, the District Court, sitting without a jury, held that the limited partnership interests purchased by plaintiff were "securities" with-

in the meaning of South Carolina's Uniform Securities Act, id. § 35-1-20(12), that the securities were sold without the registration exacted by the Act, that no exemption from registration was available, and that they were sold by means of untrue statements of material facts. Defendant assails each of these conclusions.

II.

The key issue raised by this appeal is whether the limited partnership interests purchased by plaintiff in 1975 were securities under South Carolina law. The State's provision, like its Federal analogue, is broad, encompassing almost every conceivable investment scheme.[2] On

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2. The definition, in full, is as follows:

> "Security" means any note, stock, treasury stock, bond, debenture, of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate of subscription, transferable share, investment contract,

Fn. 2 continued -

> voting-trust certificate, certificate of deposit for a security, certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. "Security" does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay money either in a lump sum or periodically for life or for some other specified period.

S.C. Code § 35-1-20(12).

its face, however, the statute does not specifically include limited partnership interests. The primary question, as framed by the parties, is whether these interests qualify as "investment contracts."

Since the statute's enactment, the South Carolina courts have not had the opportunity to construe either the term "security" or the phrase "investment contract." In Bradley v. Hullander, 272 S.C. 6, 249 S.E.2d 486 (1976), however, the South

Carolina Supreme Court suggested that it ordinarily would follow Federal courts' interpretations of the Federal securities laws where sections of the South Carolina Uniform Securities Act were substantially identical to Federal provisions. We assume, therefore, that the South Carolina Supreme Court would adopt the Federal judicature concerning "investment contracts."

The classic test for the determination of what constitutes an "investment contract" was stated in Securities & Exchange Commission v. W.J. Howey Co., 328 U.S. 293 (1946). There, the Supreme Court indicated that an investment contract would be found under Federal law where a "scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." Id. at 301. The facts of this case square with this definition. The two deals provided for the contribution of at least $585,000 by plaintiff to an enterprise including three other

parties. The record also demonstrates that plaintiff was a passive participant in these two ventures. All management responsibilities were delegated to the general partners. Plaintiff was not expected to, nor did he, take part in the running of the two partnerships. We think the District Court was correct in characterizing these investment vehicles as securities.[3]

III

Having concluded that the limited partnerships here qualify as securities under South Carolina law, defendant's remaining

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3. Defendant asserts, however, that these ought not to be classified as securities because they involve investments in real estate. While it is true that ordinary real estate investments, e.g., the purchase of a dwelling, usually are not securities under either Federal or State law, the facts of each case determine whether or not particular instruments are securities and, as a matter of law, investments in real estate can be securities. See McGreghar Land Co. v. Meguiar, 521 F.2d 822 (9th Cir. 1975). The facts of this case show that the Howey test is satisfied and that the identity of the underlying commodity is irrelevant.

objections to the District Court's judgment can be dealt with swiftly. First, we cannot agree that the trial court abused its discretion in declining to allow a continuance after permitting plaintiff to amend his complaint thirteen days before trial. Defendant had actual notice of these claims months before trial, had conducted discovery of them long before trial, and had more than enough time to prepare his defense. The District Court's exercise of discretion, therefore, was faultless.

Finally, we sense no merit in defendant's assertions that the District Court erred in a) finding Carolina Equities, Inc. to be the agent of defendant, Jones, and Dan Bruce, and b) in holding defendant responsible for fourteen material deceptions. In sum, our canvass of the record establishes that all factual findings questioned are supported by the evidence.

Affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Robert L. Kosnoski, Plaintiff, -vs- Tom S. Bruce, Defendant.	ORDER C/A No. 77-2331-3

This matter is before the Court on Defendant's Motion to Alter or Amend Findings of Fact and Judgment and for a New Trial. Upon careful consideration of the matters submitted both in support and in opposition thereto, the Court is of the opinion that in order to eliminate any question of the propriety of the Court's directing the prevailing party to draft a proposed order in accordance with express instructions of the Court as to the basic findings and conclusions determined by the Court, the Order filed November 10, 1980,

should be altered or amended as hereinafter set forth.

IT IS, THEREFORE,

ORDERED, that Defendant's Motion to Alter or Amend Judgment and for a New Trial be and hereby is denied; and

IT IS FURTHER ORDERED, that the original Order be and hereby is altered or amended as follows:

STATEMENT OF CASE

Plaintiff Robert Kosnoski instituted this action against Defendant Tom S. Bruce by service of a Summons and Complaint filed December 1, 1977. As refined in subsequent amendments,[1] the Complaint alleged

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1. The original Complaint sought relief against both the present Defendant and one Dan E. Bruce under Section 15 of the Securities Act of 1933, 15 U.S.C. 77o, and Section 20 of the Securities Exchange Act of 1934, 15 U.S.C. 78t, as well as the South Carolina Uniform Securities Act.

In early 1980, Plaintiff dismissed his claims against Dan E. Bruce in their entirety and his claims against the present Defendant under Federal securities law. Following this dismissal, Plaintiff filed an

Fn. 1 - Continued.

amended Complaint alleging a violation of the South Carolina Act, but without specifying the misrepresentations and omissions contained in the original Complaint. This amended Complaint was further amended on or about October 7, 1980, to reallege those misrepresentations and omissions, in violation of that Act. These amendments relate back to the date of the original Complaint under Fed. R. Civ. P. 15(c).

a single cause of action consisting of certain purported violations of the South Carolina Uniform Securities Act. S.C. Code §§35-1-10 - 35-1-1590 (1976) ("Act").

Defendant answered alleging, among others, that Plaintiff's claims are barred by the applicable statute of limitations and/or laches; that any damages suffered by Plaintiff were the result of his own acts or omissions and/or the acts or omissions of others for which Defendant is not liable; that any offer or sale of securities to Plaintiff was exempt from the Act's coverage by reason of §35-1-320(9) thereof; that Plaintiff failed to tender the alleged security as required by the Act; and that

Plaintiff should be estopped from asserting the claims alleged in his Complaint. Defendant also counterclaimed alleging Plaintiff has wrongfully and unreasonably withheld his approval of a proposed sale of certain property known as the Diran Executive Plaza.

The case was tried by the Court sitting without a jury on October 20-22, 1980. Based upon the evidence presented at that trial, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff is a citizen and resident of Mount Hope, West Virginia. Defendant is a citizen and resident of Greenville, South Carolina.

2. During the period in issue, Defendant was a partner, along with Dan E. Bruce ("Bruce") and James E. Jones, Jr. ("Jones"), of a South Carolina general partnership known as Bruce, Bruce & Jones ("Original Partnership"). In April of 1975, this partnership owned an office building and

an 85% interest in approximately nine acres of undeveloped land located adjacent thereto along South Carolina Highway 291 in Greenville, South Carolina.[2]

3. Robert Threlkeld ("Threlkeld") and George Beggs ("Beggs") were principals in a Greenville real estate corporation known as Carolina Equities, Inc. In September of 1975, Threlkeld contacted Plaintiff to ascertain whether he was interested in making investments. Plaintiff responded that he might be so inclined if the proposed investment met his investment criteria.

4. Sometime prior to October 6, 1975, Threlkeld and Beggs contacted the Original Partnership and were informed of their desire to create a limited partnership to develop the nine undeveloped acres. The Original Partnership authorized Threlkeld to offer Plaintiff a 23.52% limited partnership

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2. The remaining 15% interest in the land was acquired subsequently.

interest in this venture ("Land Partnership") for $105,000.00.

5. On October 27, 1975, Plaintiff met with Defendant, Jones and Threlkeld, in Greenville to discuss the Land Partnership. During the course of that meeting, Defendant informed Plaintiff of his numerous business ventures.[3] Defendant and Plaintiff then discussed the possibility of Plaintiff purchasing a limited partnership interest in the office building.

6. On the following day, October 28, 1975, Threlkeld offered Plaintiff a limited partnership interest in the office building on the Original Partnership's behalf. Under the terms of this offer, Plaintiff would purchase a 95% limited partnership interest and Defendant, Bruce and

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3. These ventures included an automobile auction, a cattle auction, a tractor dealership and an apartment complex.

Jones, would act as general partners ("Building Partnership").[4]

The materials accompanying and explaining this offer were admitted as Plaintiff's Exhibit 3. Included in these materials was Threlkeld's confirmation of an earlier appraisal of the property. Threlkeld admitted that most of the information upon which his confirmation had been based was supplied by the Original Partnership and that the Original Partnership would pay Carolina Equities, Inc. a commission upon consummation of the proposed sale.

7. Threlkeld subsequently entered into negotiations with Defendant, Bruce and Jones, in accordance with which the Land Partnership paid him a $15,000.00 commission and the Building Partnership agreed to pay him a $26,000.00 commission, of which $17,333.34 was paid. According to

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4. The same offer previously had been made to persons other than Plaintiff.

the testimony of Stanley Lewis, Deputy South Carolina Securities Commissioner, Threlkeld, Beggs and/or Carolina Equities, Inc., were never registered with the South Carolina Securities Commission as either broker-dealers or investment advisors.

8. Plaintiff did not at any time offer to pay Threlkeld a commission or fee, and Threlkeld at no time asked him to do so. On one occasion, Threlkeld wrote Plaintiff that he was acting as broker representing Plaintiff's interest and, on another occasion, that he was acting as agent on Plaintiff's behalf, but Plaintiff disavowed these remarks to him. On November 10, 1979, Threlkeld by letter represented to the attorney for the Original Partnership that Carolina Equities, Inc., had negotiated the purchase of an equity interest in the Land and Building Partnership as Plaintiff's agent, continuing, however, that Plaintiff had made several requests to which the Original Partnership had agreed and which

were "summarized in the enclosed letter which I wrote to Mr. Kosnoski on October 28, 1975."

Based on this witness' demeanor and the discrepancies between the above quoted language of his letter to the Original Partnership's attorney and other evidence of the October 28, 1975, offer, the Court gives no credence to his representation of agency. Conversely, the Court finds that at all pertinent times between October 5, 1975, and the transaction's consummation on December 24, 1975, Threlkeld occupied the relationship of an agent to the Original Partnership and, at relevant times, to both the Land and Building Partnerships.

9. Defendant, individually and as general partner of the Original Partnership and, at relevant times, of both the Land and Building Partnerships, and through their agent, made certain representations to Plaintiff constituting information as to which a prudent investor ought reasonably to be informed before investing and upon which

which Plaintiff reasonably relied without knowledge of any untruths or omissions. Included among these representations were:

(a) That the Dan Bruce Company, in which Defendant was a substantial shareholder, was one of the largest and most financially sound real estate companies in Greenville;

(b) That as of October 6, 1975, the office building was 77% leased:

(c) That the general partners would pay all mortgage indebtedness;

(d) That the down side risk on the Land Partnership was practically zero;

(e) That the general partners would guarantee Plaintiff a priority claim on cash flows to a 10% rate on his initial investment in the Building Partnership;

(f) That the general partners had financial strength;

(g) That as of October 28, 1975,

the office building was at the break-even point with strong credit leases;

(h) That for five years there would be zero vacancy and collection loss on the third floor of the building occupied by Dan Bruce Company (Diran Corporation);

(i) That, as of December 16, 1975, the actual rents being collected were higher than the projected rents in the lender's appraisal;

(j) That the property of the Land Partnership would be released and discharged from the lien of mortgages given by one of the general partners as to his undivided interest in the land;

(k) That Plaintiff's capital contributions would be stretched over three years;

(l) That Plaintiff's contribution to the Building Partnership would be used first to pay the debts of the Building Partnership and to establish

cash reserves to cover the cost of future tenant improvements and operating expenses and would be sufficient for these purposes;

(m) That if Plaintiff's capital contributions were insufficient, advances to the partnership for operating deficits, mortgage payments, and for tenant improvements not yet installed or paid for would be paid by the general partners;

n) That in connection with the Building Partnership, the sum of $155,000.00 (of which as much as $60,000.00, if not needed, could be loaned to the general partners) would be paid or reserved for operating expenses and tenant improvements before any sums were disbursed to the general partners.

10. On or about December 22, 1975, Defendant, Bruce and Jones, acting on their own and the Original Partnership's behalf,

caused the formation of the land and Building Partnerships as South Carolina limited partnerships and transferred ownership of the undeveloped land to the Land Partnership and of the building and grounds to the Building Partnership. On December 24, 1975, Plaintiff, in Greenville, South Carolina, accepted the offers and paid the cash sum of $105,000.00 to the Land Partnership for his limited partnership interest therein and the cash sum of $160,160.00 plus a promissory note for $300,000.00 payable in two installments to the Building Partnership for his limited partnership interest therein. Plaintiff paid the first installment under the note with interest ($160,000.00) when due on April 15, 1976, and the second installment with interest ($159,840.00) when due on April 15, 1977, yet never received any income as a result of these investments.

11. Under the terms of the limited partnership agreements, the general partners were responsible for the operation and man-

agement of partnership property and affairs. The limited partners had no right to participate in management.

12. On the basis of the above facts, the Court finds that Plaintiff made investments in common ventures premised upon a reasonable expectation of profits to be derived from the intrepreneurial and managerial efforts of the general partners and that the limited partnership interests in these ventures constituted securities within the meaning of S.C. Code §35-1-20(12).

13. No prospectus covering these securities was approved by the South Carolina Securities Commissioner and/or delivered to Plaintiff and the offerings were not registered with nor was application for exemption from registration made to or granted by the South Carolina Securities Commission. Had such application been made, the Securities Commissioner would have been made aware that a commission was to be paid to one who was not a registered broker-dealer, and an exem-

tion in all probability would not have been granted. Moreover, the Securities Commissioner would have been made aware that part of the purchase price for these securities was payable in negotiable promissory notes and of the purpose for which the proceeds from their sale were to be used, as a result of either of which an exemption would have been denied.

14. Representation 9(a), supra, was patently untrue. In the fall of 1975, the Dan Bruce Company was in such severe financial straits that it was not able to pay rent on the space it had leased in the office building.

15. Representation 9(b), supra, was untrue and misleading in that it failed to reveal that the Dan Bruce Company occupied 47% of the building and was not at that time paying rent.

16. Representation 9(c), supra, was, at the very least, negligently made. There is evidence that Defendant never gave

any thought or consideration to whether he would make the mortgage payments if Bruce and/or Jones failed to contribute their share.

17. Representation 9(d), supra, was untrue and misleading in that Defendant omitted to state that if the Land Partnership did not generate sufficient funds from sales or refinancing during 1976 to pay off the accrued mortgage indebtedness foreclosure proceedings might be instituted.

18. Representation 9(e), supra, was, at the very least, negligently made in that, although the general partners did guarantee Plaintiff a 10% cash flow on his initial investment in the Building Partnership, there is, as previously noted, evidence that Defendant never gave any thought or consideration to whether he would make the mortgage payments so as to prevent foreclosure so that there could be a positive cash flow.

19. Representation 9(f), supra,

was patently untrue. The evidence reveals that Bruce and Jones lacked financial strength and that Defendant knew or should have known this fact.

20. Representations 9(g), (h), and (i), supra, were untrue. The evidence reveals that the office building was not at any time at the break-even point; that the lease to Dan Bruce Company was not a strong credit lease since it was not paying its rent; that there was a collection loss on the third floor which was occupied by Dan Bruce Company; and that the actual collection rate was far below that projected in the lender's appraisal.

21. Representation 9(j), supra, was untrue and misleading in that it omitted material facts necessary to make it not misleading. Defendant knew at the time the representation was made that the property held by the Land Partnership was encumbered by a second mortgage to Community Bank and a third mortgage to Bankers Trust.

These mortgages, encumbering a 42.5% interest in the land, had been given by Bruce to secure personal debts in the amounts of $87,500.00 and $349,000.00 respectively. Nonetheless, on December 17, 1975, Defendant, Bruce and Jones, certified to Plaintiff in writing the outstanding loan obligations of the Land Partnership, omitting any mention of these mortgages. And on December 24, 1975, Defendant represented and warranted to Plaintiff that the property held by the Land Partnership was free and clear of all mortgage liens and encumbrances except for those noted in the partnership agreement, once again omitting any reference to these mortgages.

These written representations were false and misleading in that the mortgages had not been released as of the dates the representations were made. Rather, the consideration for their release was not paid until December 29, 1975.

Although this fact might, under

certain circumstances, render the misrepresentations immaterial, Defendant, Bruce and Jones, omitted to state that, in order to obtain such release, Bruce would have to assign his interest in the Land Partnership to the two banks as security for the $436,500.00 aggregate debt; that the Land Partnership had to agree not to sell, mortgage or otherwise dispose of the previously encumbered interest without first obtaining the written consent of both banks; that cash funds then and thereafter belonging to the Land Partnership which could be distributed to Bruce would have to be paid to the banks to satisfy his indebtedness; and that Bruce would have to pay $13,635.00 to Community Bank and $16,923.61 to Bankers Trust for the releases. These omissions clearly render the original misrepresentations material.

22. Representation 9(k), supra, was untrue in that, although the partnership agreement was structured so that

Plaintiff's capital contributions would be spread over a three year period, the general partners, at the time of closing, intended to and subsequently did discount Plaintiff's notes, whereby his entire capital contribution was paid in and disbursed within thrity-six days.

23. Representations 9(l), (m), and (n), supra, were untrue and misleading due at least in part to the fact that they omitted material facts necessary to make them not misleading. The Original Partnership was experiencing severe financial difficulties and in need of a substantial sum of money to pay its past due debts, including past due payments on a $750,000.00 first mortgage to Bankers Trust on the land, a $1,120,000.00 first mortgage to New York Life on the office building, a $225,000.00 second mortgage to Aiken-Spier on the office building, and sums past due to contractors for labor and materials.

Defendant knew at the time of closing that the prevailing real estate market would prevent the profitable exploitation of the partnership properties in time to provide sufficient funds to forestall foreclosure under the first mortgages and to cover the net operating deficits which Defendant knew or should have known from prior experience would continue to plague the properties. He also knew that neither the Land or Building Partnerships had any significant assets other than the encumbered real estate.

Defendant made Plaintiff aware of the Building Partnership's need for cash prior to the closing, but failed to reveal the full extent of the partnership debts and cash needs at that time. Moreover, he did not advise Plaintiff of his and his co-general partners' intent to withdraw much of the monies generated by the sale of the limited partnership interests for their own use in gross disregard of both the partner-

ship agreement and the financial needs of the partnership.

Immediately prior to Plaintiff's purchase of the limited partnership interests the Original Partnership had cash assets of less than $250.00 and past due debts in excess of $48,000.00. These debts could have been satisfied out of Plaintiff's $160,160.00 cash payment to the Building Partnership. However, Defendant and his co-general partners used this cash for their own purposes, leaving many of the Building Partnership's past due debts unpaid.

The entire $160,160.00 deposit made on December 29, 1975, was drawn out by the general partners on the same day. Payments totalling $66,002.43 were made for accounting and legal fees ($10,778.60), principal and interest on the New York Life mortgage ($21,466.00), interest on the Aiken-Spier mortgage ($13,200.00), commissions to Carolina Equities, Inc. ($8,666.67), and other miscellaneous debts ($12,026.16). Past

due debts totalling $33,822.10 were left unpaid, including amounts owing to contracotrs and materialmen as well as New York Life.

Rather than paying off these past due debts with the remaining balance of the deposit, this $94,157.57 was withdrawn by the general partners and used by them for their own benefit. Defendant received $19,702.81 as a cash disbursement and $7,000.00 as interest on a loan due him. Jones received $9,851.41 as a cash disbursement and $35.00 as interest on a loan due him. Bruce received $29,554.20 as a cash disbursement. The Building Partnership made a $28,014.15 advance to the Land Partnership.[5] The net effect of these withdrawals was to reduce the partnership's cash assets

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5. It appears that this advance was used by the general partners to pay debts of the Land Partnership for which they, as general partners, were liable under the Land Partnership agreement, including a $15,000.00 commission to Carolina Equities, Inc.

to the same level as before the $160,160.00 deposit without substantially reducing its past due debts.

Still in need of cash, Defendant, Bruce and Jones, made arrangements with the First National Bank for a $275,000.00 loan to be secured by an assignment of Plaintiff's $300,000.00 note. On or about January 9, 1976, First National, based upon the borrowers' representation that the proceeds would be used by the Building Partnership to make tenant improvements to the office building, agreed to make the loan if Plaintiff would give his written consent to the assignment of his note. Shortly thereafter, Bruce contacted Plaintiff and informed him that the Building Partnership desired to assign his note to First National in order to raise cash for tenant improvements to the office building and that such assignment would not alter his original position. On January 26, 1976, his note was assigned to the bank and on January 26, 1976, Plaintiff consented.

The $275,000.00 loan, less $110.00 for documentary stamps, was evidenced by a note of the Building Partnership and advanced in two installments. The first installment, totalling $74,970.00, was deposited in the Land Partnership's account with First National on January 26, 1976. The second installment, totalling $199,920.00, was deposited in the Building Partnership's account with First National on January 29, 1976.

All but $1,051.00 of the first installment was paid out upon deposit. $31,650.10 was paid to Taylor Construction and Faulkner Fence for labor and material previously furnished the property; $776.24 was paid to Surfco and Gem Signs for tenant improvements; and $41,333.33 was used to repay loans of $38,288.64 and $3,044.69 made by First Piedmont Bank and Bruce respectively to the Land Partnership on January 13,

1976.[6] The remaining $1,051.00 was used to pay First National's attorneys and to partially satisfy an outstanding indebtedness to Sherwin Williams Company.

Defendant, Bruce and Jones, withdrew the entire second installment immediately upon deposit,[7] once again leaving the Building Partnership with less than $250.00 in cash and the past due debt under the first mortgage unpaid. This mortgage remained in various stages of default until it was foreclosed by New Life.

Notwithstanding the representations to First National and Plaintiff to secure the loan and the provisions of the partnership

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6. The proceeds from these loans had been used to pay the Original Partnership's indebtedness under a $40,000.00 loan from First National.

7. Of this withdrawal, Defendant received $131,655.70, Bruce received $47,460.00 and Jones received $20,804.20.

agreement,[8] less than $1,000.00 of the proceeds was used for tenant improvements to the office building. The balance was either used to pay pre-existing debts or withdrawn by the general partners for their own use.

Defendant knew that tenant improvements were essential for the office building to be leased and that the partnership had past due debts. He also knew or should have known from past experience that the partnership would continue to suffer cash flow deficits until the office building was leased to a break-even point. Yet the evidence clearly demonstrates that he, along with Bruce and Jones, knowingly jeopardized the partnership and Plaintiff's interest

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8. Under the partnership agreement, cash reserves of at least $155,000.00 (less as much as $60,000.00 for partner loans if not needed by the partnership) for tenant improvements and, as accountant Simpkins testified, at least $20,000.00 for operating expenses should have been maintained for the use of the Building Partnership.

therein for their own financial advantage.

The withdrawal from the partnership accounts left the Building Partnership in essentially the same condition as it was in before Plaintiff's investment, a condition which Defendant had represented to Plaintiff would be cured by his capital contributions. And even if the maintenance of the cash reserves required by the partnership agreement was construed as discretionary with the general partners, in view of the partnership's distraught financial condition there was a clear abuse of discretion in siphoning off those reserves for the general partners' personal use.

Contrary to Defendant's and his co-general partners' representations to Plaintiff prior to his investment, it is clear that, at the time those representations were made, the general partners never intended to reserve, nor did they in fact reserve, any funds for the Building Partnership (1) to meet future capital requirements and pay

future operating expenses and debts; (2) to complete the office building so that it could be leased to a break-even point; or (3) to make payments under the first mortgage as they became due. Representations 9(1) - (n), supra, were accordingly untrue when made.

24. Defendant testified to the effect that he did not participate in the activities leading up to Plaintiff's purchase of the limited partnership interest and had no knowledge of any representations made to Plaintiff in conjunction with the sale. Based upon the Court's observance of this witness' demeanor on the witness stand and in view of the manifest conflict between his testimony and the totality of the evidence, the Court finds that his testimony lacks credibility.[9]

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9. For example, Defendant testified that either he or his company made cash payments to the Building Partnership for rentals due from the Company. The evidence reveals, however, that the rental payment by the P.L.

Fn. 9 - Continued.

Bruce Company consisted of a mere journal entry in the amount of $26,500.00 involving no actual cash payment.

25. As to Defendant's statute of limitations defense, the Court finds that the purchase and sale of securities out of which this action arose was consummated on or about December 24, 1975, and that this action was instituted on December 1, 1977.

26. As to Defendant's laches defense, the Court finds no credible evidence of any delay or other inequitable conduct operating to Defendant's injury, prejudice or disadvantage.

27. As to Defendant's Fourth Defense, the Court finds no acts or omissions of Plaintiff or others for whom Defendant is not responsible causing or contributing to the injuries alleged in the Complaint.

28. As to Defendant's Fifth Defense, the Court finds that Plaintiff tendered the securities at trial and before judgment.

29. As to Defendant's estoppel defense, the Court finds no credible evidence of any facts giving rise to an estoppel.

30. As to the Counterclaim, the Court finds that one Limehouse did in fact offer to purchase the Diran Executive Plaza for $290,000.00 and that such offer was refused by Plaintiff. The Court additionally finds, however, that this offer was subject to a number of conditions the fulfillment of which was not reasonably expectable and that Plaintiff's refusal to consent to the sale was neither wrongful nor unreasonable.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this matter under 28 U.S.C. §1332.

2. The limited partnership interests purchased by Plaintiff constituted securities within the meaning of S.C. Code §35-1-20(12).

In Goodman v. Epstein, 582 F.2d 388 (7th Cir. 1978), the Court, in an action

based upon Federal securities law, stated that:

> "The basic test which has been enunciated by the Supreme Court for determining the existence of a security involves three elements: (1) an investment in a common venture (2) premised on a reasonable expectation of profits (3) to be derived from the entrepreneurial or managerial efforts of others, United States Housing Foundation, Inc. v. Forman, 421 U.S. 837, 852, 95 S.Ct. 2051, 44 L.Ed.2d 621 (1975). A limited partner's interest in a limited partnership...meets, on its fact, all of these requirements..." 582 F.2d, at 406.

This conclusion is supported by numerous courts and commentators,[10] and is clearly applicable to the facts of this case.

3. The securities in issue were not registered as required by the South Carolina Act and were not exempt from regis-

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10. See, e.g., McGreghar Land Co. v. Meguiar 521 F.2d 822 (9th Cir. 1975); Jennings & Marsh, Securities Regulations 252 (1968). See also S.E.C. Release No. 33-4877, Aug. 8, 1967, 1 CCH Fed. Sec. L. Rptr. ¶1046, pp. 2062-2063.

tration under that Act by virtue of §35-1-320(9) thereof, since a commission or other renumeration was paid in connection with Plaintiff's solicitation, no application was made to the South Carolina Securities Commissioner to withdraw such condition and such condition was not in fact withdrawn.[11] Moreover, at no time did Defendant deliver or cause to be delivered to Plaintiff a prospectus approved by the Securities Commissioner covering these securities as required by S.C. Code §35-1-990.

4. The violations of S.C. Code §§35-1-810 and 35-1-990 by Defendant and persons for whose acts or omissions he is legally liable results in his liability under S.C. Code §35-1-1490(1).

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11. Under S.C. Code §35-1-340, Defendant had the burden of proving an exemption or exception from a definition, which he has failed to do. Under the express provisions of S.C. Code §35-1-1550, Defendant is precluded from asserting any waiver of compliance with the Act.

5. In addition to, and regardless of, Defendant's liability under S.C. Code §35-1-1490(1), supra, Defendant is liable under S.C. Code §35-1-1490(2) by reason of the misrepresentations and omissions accompanying and precipitating the sale of the securities previously set forth.

The Original Partnership, as well as the Land and Building Partnerships, were "insurers" within the meaning of S.C. Code §35-1-20(7), and Defendant was a "partner" in each of those partnerships within the meaning of S.C. Code §35-1-1500, and is jointly and severally liable for their delicts Moreover, Defendant individually offered and sold the securities in issue and is individually liable for his misrepresentations and omissions under S.C. Code §35-1-1490(2), supra.

6. Plaintiff conclusively demonstrated that the misrepresentations and omissions previously set forth were "material" within the meaning of S.C. Code §35-1-

1490(2), supra. The standard for determining materiality is an entirely objective one, the actual attitude of the parties toward the matter not being determinative. Mere negligent representations or omissions may constitute violations of S.C. Code §35-1-1490(2), supra, and the entire burden of proof with regard to the non-existence of seller negligence, recklessness, or intent to defraud is upon the seller. Bradley v. Hullander, 272 S.C. 6, 249 S.E.2d 486 (1978). Defendant failed to meet this burden.

7. S.C. Code §35-1-1490 provides, in pertinent part, that any person violating (1) and (2) thereof

> "Is liable to the person buying the security from him [for] the consideration paid for the security, together with interest at six per cent per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security..."

Plaintiff did not receive any income on the securities and is, therefore, entitled to the sum of $265,160.00 plus interest at 6%

per annum from December 24, 1975, the sum of $160,000.00 with interest at 6% per annum from April 15, 1976, the sum of $159,840.00 with interest at 6% per annum from April 15, 1977, costs, and reasonable attorneys' fees. Such sums are not subject to offset by reason of the Counterclaim and same is dismissed with prejudice.

IT IS, THEREFORE,

ORDERED, that judgment heretofore entered on November 11, 1980, for Plaintiff against Defendant in the amount specified above is reaffirmed; and

IT IS FURTHER ORDERED, that a hearing be held within thirty (30) days hereof to determine the amount of costs and attorneys' fees recoverable by Plaintiff, such amount to be added to the judgment set forth above.

IT IS SO ORDERED.

/s/ G. Ross Anderson, Jr.
G. ROSS ANDERSON, JR.
UNITED STATES DISTRICT JUDGE

Greenville, South Carolina

January 13, 1981

Filed: January 13, 1981.

Office · preme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

NO. 81-2232

SUPREME COURT OF THE UNITED STATES

October Term, 1982

TOM S. BRUCE,

Petitioner,

v.

ROBERT L. KOSNOSKI,

Respondent.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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RULE AND STATUTES INVOLVED

Rule 17 of the Supreme Court of the United States 4, 11

§35-1-810 South Carolina Code of Laws (1976) 9, 10

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§35-1-1490 South Carolina Code of Laws (1976)..1, 2, 3, 5, 6, 9, 10

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BRIEF IN OPPOSITION

Statement

Respondent, Robert L. Kosnoski, instituted this action on December 1, 1977, seeking relief under Section 15 of the Securities Act of 1933, 15 USC 77o, Section 20 of the Securities Exchange Act of 1934, 15 USC 78t, and §35-1-1490(1) of the South Carolina Code of Laws (1976) (failure to register and deliver a

prospectus) and §35-1-1490(2) South Carolina Code of Laws (1976) (misrepresentations and omissions).

After discovery was completed and the case had been announced to be ready for trial, Respondent amended his Complaint by deleting his claims under the federal securities laws, and due to inadvertence the Amended Complaint did not include the specifications of misrepresentations and omissions which had been contained in the original Complaint. On October 7, 1980, thirteen days before the commencement of trial, the District Court permitted Respondent to further amend to reallege those same misrepresentations and omissions, whereupon Petitioner moved for a continuance. The Court's denial of that motion, and, after judgment, the affirmance thereof by the Court of Appeals, gave rise to this Petition for Writ of Certiorari.

As Petitioner points out at page 11 of his Petition, at the call of the case for trial he announced that he was ready to proceed to trial on the failure to register claim, but professed that he was not ready to proceed on the anti-fraud claims.

The trial of the action resulted in judgment against the Petitioner for both failure to register and provide a prospectus (§35-1-1490(1)) and the anti-fraud claim (§35-1-1490(2)) (Pet. pp. 45a-46a).

Argument

The insignificant question of whether the District Court abused its discretion in refusing to grant a continuance, particularly when the judgment was rendered upon additional grounds upon which Respondent stated that he was ready to proceed to trial, is so frivolous that it merits neither this Court's consideration

nor a lengthy discussion of the issues.

A. There are no special and important reasons why the writ prayed for should be granted.

Respondent ignores the admonition of Chief Justice Vinson that "Lawyers might be well-advised, in preparing petitions for certiorari, to spend a little less time discussing the merits of their cases and a little more time demonstrating why it is important that the Court should hear them."* The Petition makes no attempt to "explain why it is vital that the question involved be decided finally by the Supreme Court."**

Clearly the issues discussed in the Petition satisfy none of the requirements of Rule 17 of this Court.

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*Before the American Bar Association, September 7, 1949, 69 S.Ct. VI.

**Ibid.

B. The District Court did not abuse its discretion in denying Petitioner's Motion for Continuance.

Respondent's original Complaint specifically alleged seven misrepresentations and six omissions in violation of §35-1-1490, South Carolina Code of Laws, 1976 (App. 7-9, 10); Petitioner's Answer set up numerous defenses thereto (App. 15-21); discovery took place from February through September 10, 1978, directed toward those pleadings (App. 1); the case was announced "ready for trial" on November 5, 1979, and "for trial" on January 3, 1980 and April 21, 1980, and counsel were directed to submit briefs and proposed findings of fact, when the pleadings were unchanged (App. 2). On May 29, 1980, counsel for both parties stipulated dismissal only of "the claims under the Securities Act of 1933, 15 USC §77a, et seq., in plaintiff's Complaint,

as amended" (Stipulation 5-29-80, Docket Number 17). The Amended Complaint filed May 29, 1980, which was patterned upon the Second Cause of Action of the original Complaint (App. 10-11, 23-25), alleged, "That based upon the representations hereinafter set forth . . ." (App. 24), and that the Defendant violated, inter alia, §35-1-1490, South Carolina Code of Laws, 1976 (App. 25), but the Amended Complaint did not recite the misrepresentations and omissions which had been set forth in paragraphs IX and XI of the First Cause of Action in the original Complaint and incorporated by reference in paragraph I of the Second Cause of Action in that Complaint (App. 23-25). Petitioner's Answer to the May 29 Amended Complaint asserted the same defenses that were asserted in his Answer to the original Complaint (App. 15-21, 38). The only

difference between the Amended Complaint of May 29, 1980, and the Amended Complaint of October 7, 1980, was the inclusion in the latter of the seven misrepresentations and six omissions that had been alleged in the original Complaint (App. 23-25, 32-36, 7-9); and Petitioner's Answer to the Amended Complaint of October 7, 1980, asserted the same defenses that were contained in his Answer to the original Complaint and his Answer to the Amended Complaint of May 29, 1980.

In view of the foregoing, it is abundantly clear that Respondent never "abandoned" his anti-fraud claim as Petitioner argues at page 10 of his Petition; he did not "radically change his theories of recovery against the Petitioner" (Pet. p. 7); and the Court of Appeals was eminently correct in its holding:

> Having concluded that the limited partnerships here qualify as securities under South Carolina law, defendant's remaining objections to the District Court's judgment can be dealt with swiftly. First, we cannot agree that the trial court abused its discretion in declining to allow a continuance after permitting plaintiff to amend his complaint thirteen days before trial. Defendant had actual notice of these claims months before trial, had conducted discovery of them long before trial, and had more than enough time to prepare his defense. The District Court's exercise of discretion, therefore, was faultless (Pet. pp. 11a-12a).

C. Even if the District Court had erred in denying Petitioner's Motion to Continue the trial of the anti-fraud claims, such error would have been harmless.

At the beginning of the trial, counsel for Petitioner advised the Court:

> Your Honor, the defendant is ready to proceed the trial on the failure to register claim under the South Carolina Blue Sky Act . . . ." (App. 123).

The trial then proceeded on that

claim as well as the anti-fraud claim, and the District Court Concluded as follows:

> 3. The securities in issue were not registered as required by the South Carolina Act and were not exempt from registration under that Act by virtue of §35-1-320(9) thereof, since a commission or other remuneration was paid in connection with Plaintiff's solicitation, no application was made to the South Carolina Securities Commissioner to withdraw such condition and such condition was not in fact withdrawn. Moreover, at no time did Defendant deliver or cause to be delivered to Plaintiff a prospectus approved by the Securities Commissioner covering these securities as required by S.C. Code §35-1-990.
>
> 4. The violations of S.C. Code §§35-1-810 and 35-1-990 by Defendant and persons for whose acts or omissions he is legally liable results in his liability under S.C. Code §35-1-1490(1).
>
> 5. In addition to, and regardless of, Defendant's liability under S.C. Code §35-1-1490(1), supra, Defendant is liable under S.C. Code §35-1-1490(2) by reason of the misrepresentations and omissions accompanying and

> precipitating the sale of the securities previously set forth.
>
> The Original Partnership, as well as the Land and Building Partnerships, were "issuers" within the meaning of S.C. Code §35-1-20(7), and Defendant was a "partner" in each of those partnerships within the meaning of S.C. Code §35-1-1500, and is jointly and severally liable for their delicts. Moreover, Defendant individually offered and sold the securities in issue and is individually liable for his misrepresentations and omissions under S.C. Code §35-1-1490(2), supra. (App. 90).

Under §35-1-1490, South Carolina Code of Laws, 1976, any person who (1) offers or sells a security in violation of, inter alia, §35-1-810 and §35-1-990 or (2) offers or sells a security by means of any untrue statement, etc. is liable to the person buying the security from him; thus, even if there had been any error with regard to the trial of the anti-fraud cause, such error would have

been entirely harmless.

Conclusion

The question raised in this Petition for Writ of Certiorari cannot conceivably rise to the level of substance and importance worthy of this Court's attention. The issues satisfy none of the requirements of Rule 17 of this Court. No Petitioner should impose upon this Court to decide whether harmless error has been committed.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness, against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 35-1-810, Code of Laws of South Carolina, 1976, provides:

> §35-1-810. Registration or exemption required.
>
> It is unlawful for any person to offer or sell any security in this State unless (a) it is registered under this chapter or (b) the security or transaction is exempted under §35-1-310 or 35-1-320.

Section 35-1-990, Code of Laws of South Carolina, 1976, provides:

§35-1-990. Prospectus must be furnished.

As a condition of registration a prospectus approved by the Securities Commissioner shall be sent or given to each person to whom an offer is made before or concurrently with (a) the first written offer made to him, otherwise than by means of a public advertisement, by or for the account of the issuer or any other person on whose behalf the offering is being made or by any underwriter or broker-dealer who is offering part of an unsold allotment or subscription taken by him as a participant in the distribution, (b) the confirmation of any sale made by or for the account of any such person, (c) payment pursuant to any such sale or (d) delivery of the security pursuant to any such sale, whichever first occurs.

Section 35-1-1490, Code of Laws of South Carolina, 1976, provides:

§35-1-1490. Liability to buyers for illegal or fraudulent sales or offers.

Any person who:

(1) Offers or sells a security

in violation of subsection (2) of §35-1-170 or §35-1-410 or §35-1-810, or of any rule or order under §35-1-50 which requires the affirmative approval of sales literature before it is used or of any condition imposed under §35-1-950 or §35-1-990; or

(2) Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission;

Is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at six per cent per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and

interest at six per cent per year from the date of disposition.